IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-968

DETROIT EDISON COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF PERSONNEL TESTING COUNCIL OF METROPOLITAN WASHINGTON, PERSONNEL TESTING COUNCIL OF SOUTHERN CALIFORNIA, METROPOLITAN NEW YORK ASSOCIATION FOR APPLIED PSYCHOLOGY AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INTEREST OF THE *AMICI CURIAE*

The Personnel Testing Council of Metropolitan Washington, the Personnel Testing Council of Southern California, Inc., and the Metropolitan New York Association for Applied Psychology join together as *amici curiae* for this case.

The Personnel Testing Council of Metropolitan Washington is an organization composed of personnel specialists, industrial psychologists, and other professionals interested in improving the quality and fairness of personnel selection procedures and in sharing ideas and training in this area. Membership has grown rapidly and includes practitioners in personnel administration from government agencies and private industry. *The Personnel Testing Council of Southern California* is one of the oldest organizations devoted to personnel testing and selection in the country. Membership consists of personnel and industrial psychologists, personnel specialists and other professionals interested in advocating the use of fair and non-discriminatory employment practices and in encouraging the use of professionally sound selection and testing practices. *The Metropolitan New York Association for Applied Psychology* is an association of psychologists and other professionals interested in the development of applied behavioral sciences. It has functioned for over 25 years and has a large membership in the New York metropolitan area drawn from public and private employers, academic organizations, research organizations and consultants in organization psychology.

These geographically widespread professional personnel, testing and social science research groups have joined together in this brief out of a concern that vital issues affecting employee aptitude testing and personnel selection, which might easily be overlooked or given insufficient attention in a case involving the construction of the National Labor Relations Act (NLRA), receive their due consideration. The *amici* believe that the Supreme Court must balance the requirements of the NLRA on

the one hand, and Title VII of the Civil Rights Act of 1964 on the other, and fashion a result compatible with the purposes of both statutes, and with the importance of self-regulation of professionals which have a continuing impact on the orderly function of society.

SUMMARY OF ARGUMENT

This case calls for the intervention of this Court, to harmonize two major statutes and strike a just balance between them. This case involves more than the construction of the National Labor Relations Act, as the court below seems to think. It raises important issues affecting Title VII of the Civil Rights Act of 1964, as amended, and the Executive Order mandating non-discrimination in employment by government contractors (E. O. 11246, as amended), and it affects effective self-regulation by the psychological profession.

It is perhaps not surprising for an administrative agency (here the NLRB) to decide the case before it on the basis of the single statute (here the NLRA) which it was created to enforce. But the responsibility of the judiciary is broader. It is incumbent upon the courts to weigh carefully all interrelated considerations, so that a decision in a particular case arising under one specific statute will not do violence to other statutory schemes or to other valid public policy considerations. See *Emporium Capwell* v. *WACO*, 420 U. S. 50 (1975); *Volkswagenwerk* v. *Federal Maritime Commission*, 390 U. S. 261, 282 (1968), (Harlan, J. concurring).

The court below overlooked this obligation. It grounded its enforcement of the NLRB order herein solely on a strict reading of the National Labor Relations Act, disregarding the impact of its decision on the effective implementation of Title VII and other civil rights laws. Further, it disregarded the impact of its decisions on the professional practice of industrial psychologists who find themselves required to comply with an NLRB order that forces them to violate professional codes of

responsibility which have been adopted not only by their professional associations but by several states as preconditions to licensing.

This Court should therefore grant the petition for a *writ of certiorari* to reassert this basic aspect of judicial review of administrative orders, and to enable the issues raised herein to be fully briefed and decided.

ARGUMENT

I.

The decision below precludes employers from complying with the requirements of the various civil rights statutes that employee selection devices be job-related.

This court has constantly reaffirmed the requirement that aptitude tests and other employment selection devices must be shown to be job-related in order to survive a challenge to their use under Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e, *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975), or indeed under a challenge grounded on constitutional standards, *Washington* v. *Davis* 426 U. S. 279 (1976). Most recently this court affirmed without opinion a decision by a three-judge district court that the National Teachers Examination passed constitutional and statutory challenge because it was validated as job-related according to professional standards. *United States* v. *South Carolina*, 46 U. S. Law Week 3452 (January 17, 1978).[1]

Professional standards of validation provide the touchstone for the determination of job-relatedness, under federal

[1] The three-judge court stated that "[t]o the extent that the EEOC guidelines conflict with well-grounded expert opinion and accepted professional standards, they need not be controlling." *United States, et al.* v. *South Carolina*, 15 E.P.D. ¶7920 N.20 (D.S.C. 1977).

law. Thus, in § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), Congress has specifically provided that "it shall not be an unlawful employment practice for an employer to give and to act upon the results of *any professionally developed ability test* provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate. . . ." (Emphasis added.)

Moreover, a pervasive scheme of federal agency regulations utilizes professional standards as the basis for determining job-relatedness. Thus, the guidelines of the Equal Employment Opportunity Commission (EEOC) respecting use of tests or other selection procedures require that evidence of validity must be based upon "studies employing generally accepted procedures . . . such as those described in the Standards for Educational and Psychological Tests and Manuals" published by the American Psychological Association. ("APA Standards") 29 C. F. R. § 1607.5. Similarly, joint regulations of the Labor Department implementing equal employment requirements for government contractors under E. O. 11246, 41 C. F. R. Part 60-3, the Justice Department under its varied responsibility for enforcing equal employment laws, 28 C. F. R. § 50.14, and the Civil Service Commission under its responsibilities with respect to state and federal employment all describe the APA standards as, in the Department of Labor's own words, the "generally accepted professional standards for evaluating standardized tests and other assessment techniques." 41 C. F. R. § 60-3.5(b). And just recently, on December 30, 1977, the EEOC, the Departments of Justice and Labor, and the Civil Service Commission published for comment a proposed revised set of joint testing guidelines, 42 Fed. Reg. 65542 (December 30, 1977), which by their own terms are designed to represent "*professionally acceptable methods*" of the psychological profession for demonstrating job-relatedness of a selection procedure, and which reaffirm the APA standards as "the generally accepted *professional* standard." 42 Fed. Reg. 65542 at § 5(c) (December 30, 1977) (emphasis added). The new proposal

significantly expands upon the existing EEOC guidelines on retesting found at 29 C. F. R. § 1607.12 and provides that test security is a legitimate concern of test users; see § 12 of the new proposal, 42 Fed. Reg. 65546.

Relevant sections of the APA Standards make it clear that the procedure here formulated by the NLRB and enforced by the court below would make proper validation of tests practically impossible for most employers and thus severely hinder the employer who is cognizant of his Title VII obligations from using standardized objective selection procedures. Standard I5 of the APA Standards for Educational and Psychological Tests provides:

> "I5. The test user shares with the test developer or distributor a responsibility for maintaining test security.
>
> Comment: Test security is a problem whenever a lapse in security can result in changing an individual's score without making a change in his true score. For some kinds of tests a lapse of security would not be serious. If one is to be tested for achieved skill, for example, knowing and practicing the test samples might be highly recommended. In many cases, however, *prior knowledge of test items or scoring procedures could destroy validity.* The problem is not simply one of cheating. Security may be compromised where examinees have had much prior experience with a popular test, have been taught specific test items, or have heard a lot about the test." (emphasis added)

AMERICAN PSYCHOLOGICAL ASSOCIATION, STANDARDS FOR EDUCATIONAL & PSYCHOLOGICAL TESTS (hereinafter "APA STANDARDS") 67 (1974).

Similarly, the division of the APA immediately involved with job testing has adopted a set of published principles which

supplement the APA Standards and are aimed directly at personnel selection measures. Those principles provide:

> "13. The psychologist or other test user is responsible for maintaining test security. This means that all reasonable precautions should be taken to safeguard test materials and that decision makers should beware of basing decisions on scores obtained from insecure tests."

APA DIVISION OF INDUSTRIAL-ORGANIZATIONAL PSYCHOLOGY, PRINCIPLES FOR VALIDATION AND USE OF PERSONNEL SELECTION PROCEDURES (hereinafter "DIVISION 14 PRINCIPLES") 15 (1975).

It is thus a foursquare violation of professional standards —and hence of the job-relatedness requirements of the law—for tests and test data to be made available to union officials, with no professional safeguards whatsoever. Yet that was what the Board ordered, and the Court below upheld, in this case.[2]

II.

> The requirement that industrial psychologists disclose wholesale, to unskilled lay representatives of employee groups, tests, answer sheets and unanalyzed scores of persons taking the tests, requires them to breach their duty as licensed psychologists and results in a gross invasion of privacy for test takers.

Responsible members of the psychological profession would be the first to admit that some employers have misused employment testing in the past. But the profession itself has taken great efforts to eliminate those abuses, by the design and

[2] Although the NLRB admonished the union not to distribute the tests, the dissents in the NLRB opinion and in the court below make it clear that the admonition was at best hortatory and certainly afforded no enforceable security for the test data.

enforcement of rules of practice. Significant impetus has been given to this effort by the development of equal employment opportunity law, and in particular by the decision of this Court in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). In *Griggs*, the Chief Justice, speaking for a unanimous Court, held:

> "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force *unless* they are demonstrably a reasonable measure of job performance."
> 401 U. S. 424, 436 (emphasis added).

The APA revision of the APA Standards in 1974, and the issuance of the Division 14 Principles in 1975, were developed in part as a response to this requirement.

Test security, both to ensure the integrity of validation for job-relatedness and to protect the privacy of individuals, is a key element of the guiding professional standards. Thus, the Division 14 Principles emphasize that the feasibility of using tests to predict performance criteria is contingent on the test results remaining confidential, so that they may be compared to job evaluations independently prepared by supervisors:

> "9. The collection of predictor data and collection of criterion measures should be operationally independent. A common example of non-independence is the collection of criterion ratings from supervisors who know the test scores. If a significant validity coefficient is obtained, it may be due either to a valid relationship or to manipulations of ratings to conform to scores. Such ambiguity should be avoided."

DIVISION 14 PRINCIPLES, at 7. This requirement cannot be met if the decision of the court below, releasing the scores to union officers who are not bound by professional standards, is upheld.

The Division 14 Principles further require that:

"C-7. All persons within the organization who have responsibilities related to the use of employment tests and related predictors should be qualified through appropriate training to carryout their responsibilities.

". . . .

"C-10. The psychologist is responsible for clerical accuracy in scoring, checking, coding or recording test results. This principle applies to the psychologist and to an agent to whom he has delegated responsibility. The responsibility cannot be abandoned by purchasing services from an outside scoring service."

DIVISION 14 PRINCIPLES AT 14. These principles create a high standard for industrial and organizational psychologists, which would be violated if the tests, answer sheets, and unanalyzed scores were to be given to union stewards or officers. Further, public confidence that tests provide a fair basis for making employment decisions would be destroyed.

Of equal concern is the threat to the privacy of the individuals who take employment tests with a pledge of confidentiality. A cardinal rule in this area is that test takers be assured that their test results will [redacted] remain confidential and not be released to unauthorized persons. Thus, the Division 14 Principles provide:

"C-8. Psychologists should seek to avoid bias in choosing, administering, and interpreting tests; they should try to avoid even the appearance of discriminatory practice. This is another principle difficult to apply; it goes beyond data analysis. The appearance of bias may interfere with the effective performance of a candidate in the assessment situation. At the very least, a test user can *create an environment that is responsive to the feelings of all candidates, insuring the dignity of persons.*"

DIVISION 14 PRINCIPLES AT 14 (emphasis added). It is difficult to perceive how the dignity of candidates will be preserved if their test scores are disseminated, for comparison against those of their fellow workers or applicants, to persons who are untrained in interpreting test results, and who are not bound to keep the results confidential.[3]

In *Kirkland* v. *Dept. of Correctional Services,* 520 F.2d 420 (2d Cir. 1975), the Second Circuit took care to protect the confidentiality of tests so that future takers would not be prejudiced. It would be an anomaly if protection afforded future test takers were denied to those who take tests under a pledge of confidentiality only to have their scores indiscriminately released.

The issues raised in this case thus create fundamental conflicts as to the proper balance between various statutory requirements and with the societal interest in the positive self-regulation of a learned profession. These questions are of such vital concern that full review and resolution of them by this Court is warranted.

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[3] Consider, for example, the reactions of law school students or applicants if their LSAT and examination grades were routinely distributed to student government officials.

CONCLUSION

For these reasons, the *amici* believe that a writ of certiorari should issue so that the judgment and decision of the Sixth Circuit can be thoroughly reviewed.

Respectfully submitted,

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